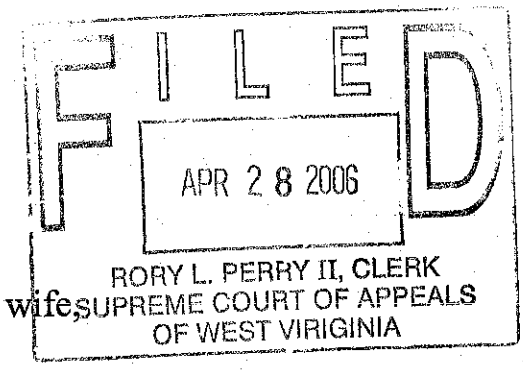
IN THE SUPREME COURT OF THE STATE OF WEST VIRGINIA

Case Number: 33063



JOHN SMITH and

KATHERINE SUE SMITH, his wife,

Petitioners,

and

IRMA SMITH,

Respondent.

APPELLANTS' BRIEF

Jason R. Grubb
Counsel for Petitioners
PO Box 2056
Beaver, WV 25813
(304)252-7989

I. The kind of proceeding and nature of the ruling in the lower tribunal.

This appeal arises from a civil trial on September 28, 2005, in the Circuit Court of Summers County, West Virginia, on the matter of reformation of a deed transferring property from Plaintiffs to Defendant to accurately reflect the intended transfer. Defendant filed counter-suit to limit the reservation clause of use of a parking lot to mere ingress and egress relative to Plaintiffs' home. Defendant also filed counter-suit regarding use of the well as described in the reservation clause, but that claim is not at issue in this appeal. At issue was the proper boundary line between the estate granted to Defendant and the parcel containing Plaintiffs' home, and the extent of use of the parking lot allowed by the reservation clause of the deed. The Plaintiffs aver that there was a mutual mistake of the proper boundary line between the rear of the estate granted and their home. The Order relative to said trial was entered on October 6, 2005. The matter was tried without a jury.

The Circuit Court ruled in favor of the Defendant on the issue of the boundary line between the properties and the limiting of the use of the parking lot retained by the Plaintiffs in the reservation clause of the deed. In conformance with Rule 3(a) of the West Virginia Rules of Appellate Procedure, the Petitioners file this Petition for Appeal.

II. Statement of the facts of the case.

In 1966 the Plaintiffs purchased the property known as the Sewell Valley Bank building. This structure was located at Meadow Creek, Summers County, West Virginia, and is the same property currently in dispute. The Plaintiffs restored the building and sometime later operated various business interests therein. Plaintiffs dug a well behind the building in the approximately three foot space between the building and a fence denoting the boundary between the Sewell Valley Bank building and the residence directly behind the building, and constructed a building there around. In approximately 1978 Plaintiffs came to own the aforementioned residence and property directly behind the Sewell Valley Bank building, thus owning "both sides of the fence." Plaintiffs restored said residence and moved in, still maintaining the businesses in the Sewell Valley Bank building. Water from the well serviced both properties. Sometime thereafter the fence was removed and additionally structures were placed in the area, using the rear wall of the well building as the front wall of the storage buildings. The Plaintiffs never had a survey of the properties and understood the rear boundary of the Sewell Valley Bank building to be the old fence line, three feet behind the actual building, encompassing the well building. Plaintiffs and predecessors in title used the parking lot beside the

Sewell Valley Bank building and in front of the residence for parking, access to the residence and other activities.

It is important to note that the Sewell Valley Bank building contained a legal description of metes and bounds, but no other property, including the residence, had such formal property descriptions.

In 2000 the Plaintiffs were approached by Defendant regarding purchasing the Sewell Valley Bank building. At the time, the Sewell Valley Bank building was not in condition to transfer, but the parties continued to discuss said transfer. During this time, and at all times relevant herein, the Plaintiffs maintained a tour bus on the outer most corner of the parking lot, in front of a garage belonging to the residence. The Defendant, being a "long lost relative" of the Plaintiffs, resided with the Plaintiffs when she was in Meadow Creek while the negotiations took place and after her purchase of the property, until such time she actually moved into the Sewell Valley Bank building. The bus remained in its parked state except when being used to travel by the Plaintiffs.

The parties walked the property at which time it is agreed the boundaries were shown to the Defendant. Plaintiffs aver the boundaries

were precise, Defendant avers shown boundaries were general in nature. Plaintiffs told Defendant that the front of her property was transected by a road to the river and that she owned property on the far side of the road. They also showed her the rail road's right of way extending within feet of one side of the building, and the parking lot on the other side. Additionally, Plaintiffs showed Defendant where the rear boundary was located, through the well and storage buildings, being the same line where the fence had previously been located. On the far side of the parking lot there was an alley that had expanded from a foot path to an alley wide enough for vehicles. Plaintiffs told Defendant that they were family, and they had to live there, so in order to transfer the property, they must be able to use the well, storage buildings and parking lot. The Plaintiffs also utilized the front of the residence, behind the Sewell Valley Bank building as their yard and for the bringing in of heating coal for the winter. It was their understanding this yard area belonged to the residence, save the front most three feet. No survey was performed before the transfer.

During the negotiations and for at least ten years prior thereto, Plaintiffs used the parking lot for visitors to park and for other activities. Most notable is the first weekend in October when the Plaintiffs cook apple butter in the driveway, near the residence, and socialize with friends who

travel from out of state. These friends often bring campers or other vehicles to stay in over the weekend and live music is often played. Prior to moving to Meadow Creek the Defendant allowed this use to continue, and allowed the use of electricity from the Sewell Valley Bank building.

After the Defendant moved into the Sewell Valley Bank building a dispute arose, involving verbal and physical altercation, regarding the Plaintiffs mowing the front yard of the residence, behind the Sewell Valley Bank building, within the confines of the boundaries previously shown to Defendant. Defendant subsequently ordered a survey. No other nearby property descriptions contained metes and bounds, only the Sewell Valley Bank building. The surveyor began his survey on the side of the road nearest the Sewell Valley Bank building and determined the front yard of the residence belonged with the Sewell Valley Bank building, within three feet of the residence. If said survey stands, Plaintiffs lose access to their front yard and only means of bringing in heating coal.

Plaintiffs brought suit to reform the deed to transfer only the property as shown to Defendant. Defendant brought counter-suit to limit the reservations of the use of the parking lot and well in the deed. The well is not at issue in this matter, but use of the parking lot was limited by the trial Judge to ingress and egress only, and the Plaintiffs were forced to move the

bus which had been parked on the parking lot since the first time they met Defendant.

III. The assignments of error relied upon on appeal and the manner in which they were decided in the lower tribunal.

A) Whether the trial court incorrectly applied the legal principals of mutual mistake in reformation of a deed.

B) Whether the trial court incorrectly applied the legal principals of property law in West Virginia by limiting the use of the parking lot as described in the reservation clause of the deed.

IV. Points and authorities relied upon, a discussion of law, and the relief prayed for.

A) Whether the trial court incorrectly applied the legal principals of mutual mistake in reformation of a deed.

It is important to first discuss the legal authorities as put forth in the underlying Order herein.

1. The Court cites William James Sons Co. v. Hutchinson, 90 S.E. 1047 (W. Va. 1916) regarding duties and rights created by a land sales contract merging into a deed upon delivery and acceptance. The William James Sons Co. case involved a land sales contract with covenants being

different from the deed with covenants subsequently delivered. The case at bar did not involve any sales contract. The Plaintiffs rely on the parol evidence of the agreement of boundaries, which can be introduced if a mutual mistake occurs. In the case at bar the evidence clearly shows the boundaries were discussed and shown, both parties knew what was to be transferred aside from any legal description, (Transcript at 33, 39, 41, 43, 44, 65, 66, 72, 77, 92, 94 and 97) thus giving rise to a mutual mistake.

2. Wolfe v. Landers, 20 S.E.2d 124 (W. Va. 1942) also involves the merging of a land sales contract with restrictive sub-division covenants merging into a deed. There was no parol evidence issue presented therein, and the party ruled against was a sophisticated business entity. Again, the case at bar does not involve any such contract.

3. Wolfe v. Landers, 20 S.E.2d 124 (W. Va. 1942) does recognize that a deed can be reformed for several reasons, including mistake.

4. Cardinal State Bank, Nat. Ass'n v. Crook, 399 S.E.2d 863 (W. Va. 1990) recognizes that extrinsic (parol) evidence may be introduced with a condition precedent, such as mistake. The failing party in the case cited by the court only relied on fraud. In the case at bar, Plaintiffs rely on the issue of mistake to allow reformation of the deed.

5. An important case cited by the court is Somon v. Murphy Fabrication & erection Co., 160 W. Va. 84 (1977), which states that calls (metes and bounds) cannot be disregarded if they can be harmonized with calls on adjacent deeds. In the case at bar no other surrounding properties had metes and bounds descriptions and the only monument was the bank building itself. (Transcript at 18, 22, 23, 28).

6. Proudfoot v. Proudfoot, 214 W. Va. 841 (2003) puts forth the principal that a deed must be upheld if possible. The issue therein was whether the grantor had actual power to make the deed. The issue of fraud was dismissed by the Plaintiff below, and mistake was not allowed to be argued for the first time on appeal. There was no issue as to parol evidence as in the case at bar, only the entire validity of the deed.

7. Sally-Mike Properties v. Yokum, 175 W. Va. 296 (1985) involved litigation of a nearly ninety year old deed that contained the reservation of a family burial ground. This Court upheld the reservation clause, although it was vague, but did not determine any actual boundaries. There were no issues of parol evidence as in the case at bar.

8. Again, in G & W Auto Center, Inc v. Yoursco, 167 W. Va. 648 (1981), there was no issue of parol evidence, only question of a reservation

clause in an unrelated lease regarding rents from a tipple. There was no question, as in the case at bar, or mistake.

9. Holleran v. Cole, 488 S.E.2d 49 (W. Va. 1997) went to the issue of other collateral agreements made by predecessors in title. This Honorable Court stated that generally a deed is not subject to contradiction by collateral agreements. The narrow issue decided was whether knowledge of these covenants by grantee put grantee on notice. This Honorable Court ruled that this knowledge did put grantee on notice and upheld a previously granted life estate. There were no questions of predecessors in title in the case at bar, however, the Defendant did have actual notice that the Plaintiffs maintained and utilized the yard area as part of their residence due to the previously mentioned showing of the property as well as her numerous stays with the Plaintiffs.

It is clear that the cases cited by the trial court's Order differentiate from the case at bar. As discussed, the Plaintiffs rely on the parol evidence rule regarding the agreed upon boundaries. The Plaintiffs aver that a mutual mistake was made by the parties regarding said boundaries. Due to said mutual mistake, the deed should be reformed to reflect the boundaries as agreed upon, and the metes and bounds description should be ignored

because there are no other similar calls on any related deed to harmonize the calls in question.

Edminston, Jr. v. Wilson, 120 S.E.2d 491 (W. Va. 1961) is a rather thorough analysis of the issue of mutual mistake and parol evidence being used to reform a deed. The relevant, lengthy discussion of precedent states:

> In *Johnston v. Terry*, **128 W. Va. 94**, **36 S.E.2d 489**, this Court said in point 1 of the syllabus that a court of equity has power and jurisdiction to decree the reformation of a deed executed through a mutual mistake of the parties as to what is intended in the deed, or through a mistake of a scrivener in failing to make the deed express the mutual intention of the parties. In *Davis v. Lilly*, **96 W. Va. 144**, 122 S.E. 444, this Court held in point 3 of the syllabus that "Generally, to warrant equity to reform a deed for mistake the mistake must be mutual; but the mistake of a scrivener in preparing a deed is regarded as the mistake of both parties, he being regarded as the agent of both." In the opinion in *Stickley v. Thorn*, 87 W. Va. 673, 106 S.E. 240, this Court used this language: "There can be no question that equity has jurisdiction to reform and correct a deed so as to make it conform to the agreement of the parties, where the scrivener in writing the deed has made a mistake." In *Koen v. Kerns*, 47 W. Va. 575, 35 S.E. 902, though it was held that the evidence was not sufficient to establish mutual mistake of the parties to the instrument, the opinion contains this quotation: "To justify the reformation of an instrument for mistake, it is necessary: First, that the mistake should be one of fact, not of law; second, that the mistake should be proved by clear and convincing evidence; third, that the mistake should be mutual and common to both parties to the instrument." ID at 525.

This Honorable Court went on to discuss that:

> Parol evidence is admissible to establish a mutual mistake in

a deed or other written instrument. *Johnston v. Terry*, **128 W. Va. 94**, **36 S.E.2d 489**; *Melott v. West*, 76 W. Va. 739, 86 S.E. 759; *Knowlton v. Campbell*, 48 W. Va. 294, 37 S.E. 581; *Koen v. Kerns*, 47 W. Va. 575, 35 S.E. 902; *Fishack v. Ball*, 34 W. Va. 644, 12 S.E. 856; *Deitz v. Providence Washington Insurance Company*, 33 W. Va. 526, 11 S.E. 50, 25 Am. St. Rep. 908; *Jarrell v. Jarrell*, 27 W. Va. 743; *Crislip v. Cain*, 19 W. Va. 438; *Creigh's Adm'r v. Boggs*, 19 W. Va. 240; *Allen v. Yeater*, 17 W. Va. 128; *Troll v. Carter*, 15 W. Va. 567; *Carter v. McArtor*, 28 Gratt. 356, 69 Va. 356; 7 Michie's Jurisprudence, Evidence, Section 162.

In *Johnston v. Terry*, **128 W. Va. 94**, **36 S.E.2d 489**, this Court held in point 3 of the syllabus that "In a suit to reform a deed, parol testimony may be introduced to show a mutual mistake of the parties to such deed, or a mistake of the scrivener in failing to make the written instrument prepared by him conform to the intention of the parties thereto."

In *Melott v. West*, 76 W. Va. 739, 86 S.E. 759, this Court held in point 1 of the syllabus that "In a suit to correct a mutual mistake in a deed so as to make it conform to the contract between the parties, evidence of previous negotiations by or on behalf of one or more of the parties, not to vary the terms of the written deed, but as showing or as tending to show what the real contract was, is admissible and competent evidence."

Under the parol evidence rule extrinsic evidence of statements and declarations of the parties to a plain and unambiguous instrument occurring contemporaneously with or prior to its execution is inadmissible to contradict, add to, detract from, vary or explain the terms of such instrument, in the absence of a showing of illegality, fraud, duress, mistake or insufficiency of consideration. *Hartmann v. The Windsor Hotel Company*, **136 W. Va. 681**, **68 S.E.2d 34**; *Kanawha Banking and Trust Company v. Gilbert*, **131 W. Va. 88**, **46 S.E.2d 225**; *Central Trust Company v. Virginia Trust Company*, **120 W. Va. 23**, **197 S.E. 12**; *O'Farrell, Admr. v. Virginia Public Service*

> *Company*, **115 W. Va. 502**, **177 S.E. 304**. That rule, however, does not apply in a proceeding to establish mutual mistake of fact in a plain and unambiguous written instrument and to reform and correct such instrument to conform to the real intention of the parties. Parol evidence to establish and correct a mutual mistake of fact in an unambiguous written instrument is admissible not because of an exception to the parol evidence rule, but because that rule does not apply to or preclude the admission of such evidence for that purpose. *Troll v. Carter*, 15 W. Va. 567. As the parol evidence rule does not apply to or preclude the statements, declarations, acts or conduct of the parties to the deed from the plaintiffs to the defendants Jesse Wilson and Julia Wilson, dated January 12, 1951, the testimony of Edmiston, Wilson and Young, the scrivener, relating to such statements, declarations, acts and conduct, being competent unless excluded by that rule, was properly admitted and considered by the circuit court. ID at 525, 526.

Further, in Myers v. Stickley, 375 S.E.2d 595 (W. Va. 1988), while this Honorable Court did not reach the issue of whether a mutual mistake occurred, this Court did state that "In equity a court can reform a deed on the grounds of a mutual mistake provided the rights of an innocent purchaser for value are not prejudiced." Id at 597. In the case at bar, as discussed, there was a mutual mistake of the actual boundaries, and there is no subsequent innocent purchaser.

For the reasons stated above, the trial court should be reversed and a reformed deed outlining the boundaries agreed upon should be issued.

B) Whether the trial court incorrectly applied the legal principals of property law in West Virginia by limiting the use of the parking lot as described in the reservation clause of the deed.

Again, it is important to discuss the legal authorities cited by the trial court herein. For convenience, said authorities shall continue to be numbered as done so in the trial court's Order.

10. The issue in West Virginia Dept. of Highways v. Farmer, 226 S.E.2d 717 (W. Va. 1976), is the payment of damages for an eminent domain action. This Honorable Court stated that ambiguities in the deed in this case should be construed against the grantor. The crux of the case was whether mineral right reservations meant sand and gravel. Since sand ang gravel had never been "mined" from the property before, only coal, the sand and gravel were outside the term of "mineral." In this case, the use of the parking lot is the key issue. As stated, the parking lot had always been used for parking of the bus, parking by visitors and other activities. (Transcript at 35, 47, 67, 68, 72, 88, 89, 98, 100).

11. In McDonough Co. v. E.I. DuPont DeNemours & Co., Inc. 280 S.E.2d 246 (W. Va. 1981), it was stated that reservations in a deed are construed against grantor. The case was regarding the location of the reservation of gravel on a property. This Honorable Court ruled that the

definition of the word "bank" as stated in the reservation, was the controlling issue. In the case at bar, it is not the location of the reservation, but the actual "use" of the reservation. The definition of the work "use" in the Merriam Webster dictionary is:

> **1 a :** the act or practice of employing something **b :** the fact or state of being used <a dish in daily *use*> **c :** a method or manner of employing or applying something <gained practice in the *use* of the camera>
>
> **2 a** (1) **:** habitual or customary usage (2) **:** an individual habit or group custom **b :** a liturgical form or observance; *especially* **:** a liturgy having modifications peculiar to a local church or religious order
>
> **3 a :** the privilege or benefit of using something <gave him the *use* of her car> **b :** the ability or power to use something (as a limb or faculty) **c :** the legal enjoyment of property that consists in its employment, occupation, exercise, or practice <she had the *use* of the estate for life>
>
> **4 a :** a particular service or end <put learning to practical *use*> **b :** the quality of being suitable for employment <saving things that might be of *use*> **c :** the occasion or need to employ <took only what they had *use* for>
>
> **5 a :** the benefit in law of one or more persons; *specifically* **:** the benefit or profit of property established in one other than the legal

possessor **b** : a legal arrangement by which such benefits and profits are so established.

It is clear that the use of the parking lot includes the parking of the bus, holding of social events and parking of visitors.

12. Hall v. Hartley, 146 W. Va. 328 (1961), states that reservations are to be expressed in certain, definite language. The ruling was on the facts of the case wherein the reservation in a deed was repugnant to the granting of the property. In the case at bar, there is a clear reservation for "use" of the parking lot, and said reservation is not repugnant to the granting of the property.

13. Malamphy v. Potomac Edison Co., 83 S.E.2d 755 (W. Va. 1954), simply states there must be a granting for there to be a reservation. The controlling issue of the case was proper damages. The case at bar does not lie in damages, but the meaning of the reservation clause.

14. In Nisbet v. Watson, 251 S.E.2d 774 (W. Va. 1979), this Honorable Court went with the plain meaning of a sewer system reservation in a subdivision. The meaning was that the system must work and any ambiguity in that matter weighed against the developer grantor.

15. Bennett v. Smith, 136 W. Va. 903 (1952) was cited for the principal that a reservation must be a certain as the granting clause of a deed. In Bennett, there was no mention of a reservation of coal rights, except by mention to prior deeds in the chain of title. In the case at bar there was an explicit reservation for the use of the parking lot.

16. The issue of whether a reservation of a life estate and timber rights was valid was addressed in Meadows v. Belknap, 199 W. Va. 243 (1997) in which a grantor reserved a said rights for himself and his wife, who joined in the instrument but had no legal title. Due to the surrounding circumstances, the grating and reservations were upheld. There is no ambiguity in the case at bar that he grantors intended to reserve the right of use of the parking lot.

17. Oresta v. Romano Bros., 137 W. Va. 633 (1952) was cited on the principal that a deed is interpreted as of the date of execution. The ultimate issue in the case, however, was proper damages. In the case at bar the use of the parking lot, as well as the boundaries, were agreed upon at the date of execution. It was only after a subsequent dispute and survey was any question raised about the boundaries and the use of the parking lot.

For the reasons stated above, the trial court should be reversed and the reservation in the deed regarding use of the parking lot should be restored to

mean any use, including parking, ingress and egress, activities, the parking of the bus, social events and visitor parking.

The trial court should be overruled and reversed on both the issue of the proper boundaries of the property and the meaning of the reservation clause in the deed.

Respectfully submitted this the 27th day of April, 2006.

JOHNS SMITH
KATHERINE SUE SMITH
By Counsel

Jason R. Grubb (ID# 9559)
PO Box 2056
Beaver, WV 25813
(304)252-7989

CERTIFICATE OF SERVICE

I, hereby certify that a true and exact copy of the foregoing has been mailed by U.S. Mail, postage prepaid to all interested parties as follows:

Richard M. Gunnoe
Attorney at Law
114 James Street
Hinton, WV 25951

This the 27th day of April, 2006.

Jason R. Grubb (ID# 9559)
Counsel for Petitioners